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Supreme Court, U.S.
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No. 97-0854

In The
Supreme Court of the United States
October Term, 1997

MICROSOFT CORPORATION, *et al.*,

Petitioners,

—v.—

DONNA VIZCAINO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' OPPOSITION TO MOTIONS FOR LEAVE TO SUBMIT AMICI BRIEFS BY CHAMBER OF COMMERCE, *et al.*, and INFORMATION TECHNOLOGY ASSOCIATION, *et al.*

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INTRODUCTION

Respondents oppose motions by employer groups to submit two *amici* briefs. The motions, dated Wednesday, December 24, 1997, were not received by Respondents' counsel until Friday, January 2, 1998. The motions are by the Chamber of Commerce of the U.S., *et al.* (hereafter "Chamber Br."), and the Information Technology Association, *et al.* (hereafter "ITA Br.").

ARGUMENT

The proposed *amici* briefs state they are in support of Microsoft's petition, which, in turn, seeks summary action. Proposed *amici* are employers' groups related to Microsoft (*e.g.*, Software Publishers Ass'n) and supporting Microsoft with *amici* briefs below. The groups did not file and serve Respondents' counsel with the proposed *amici* briefs until after Respondents' Brief was already submitted, leaving no opportunity for Respondents to deal with their arguments. In effect, this could give Microsoft an additional 30 pages of reply briefs. Indeed, Microsoft quotes and incorporates the proposed *amici* briefs in its Reply.

If Microsoft were seeking full review, with briefing on the merits after granting a writ of certiorari, Respondents would simply deal with these points in their brief on the merits. Microsoft, however, does not request full review and briefing. Pet., pp. 21, 22. The *amici* briefs should be rejected because they were not submitted early enough to permit Respondents to address their arguments in their brief in opposition.

The proposed briefs also shed no light whatsoever on the issues of Washington law here. The Chamber brief cites not even a single Washington case. The briefs instead propose, even though this case is governed by Washington law, that this Court should adopt, contrary to *Erie,* a rule of federal common law -- *i.e.,* that employers' forms mislabeling employees as "contractors" always control over the facts. This proposed rule is not only contrary to the common law of Washington, it is also contrary to the general common law of agency (see *Restatement (2d) of Agency §220(2)*) applied throughout the United States. See *Nationwide Mutual Ins. v. Darden,* 503 U.S. 318, 322-24 (1992)(adopting general common law for purposes of defining "employee" under ERISA).

Interestingly, the Paul, Hastings law firm, submitting the proposed *amici* brief for the Chamber, *et al.* (and which also submitted two *amici* briefs in the Ninth Circuit for several employer groups), has a very different public analysis of the Ninth Circuit's *Vizcaino* decision from that which it argues here. In the Paul, Hastings public Website,[1] the firm states:

> On July 24, 1997, the Ninth Circuit issued its long-awaited, en banc decision in *Vizcaino v. Microsoft Corporation,* holding that certain employee benefits might have to be provided to individuals whom Microsoft had misclassified as independent contractors. The majority's logic was quite simple:
>
> - The benefit plans covered common law employees.
> - The plaintiffs *were* common law employees.
> - Hence, the plaintiffs were eligible or potentially eligible for plan benefits.
>
> * * *
>
> Although the holding in *Microsoft* is fact-specific (and, therefore, possibly of limited precedential value), the message of the case is unmistakably clear, at least to employers in the Ninth Circuit: *Do not expect a benefit exclusion premised on employment status misclassification to be upheld.* (Emphasis original.)

Accordingly, the Paul, Hastings firm recommended that employers

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[1] www.phjw.com/ca2.htm (1/5/98).

"take appropriate steps to minimize worker misclassification, which is endemic." *Id.*

Similarly, the Seyfarth, Shaw law firm, submitting the proposed ITA, *et al., amici* brief, summarized pertinent portions of the Ninth Circuit's *Vizcaino* decision on its public Website[2]:

> The ESPP was intended to comply with Section 423 of the Internal Revenue Code and, as a result, covered all employees of Microsoft.
>
> * * *
>
> ...[T]he court found that Microsoft intended the ESPP to comply with Section 423 of the Internal Revenue Code, which requires that all common law employees be covered by each offering under a plan. Because the plaintiffs met the common law employee test, regardless of their independent contractor designation, they were eligible to purchase stock under the ESPP.
>
> ... In addition, the court found that by incorporating the requirements of Code Section 423 into the ESPP, Microsoft had extended an offer or constructive offer to the plaintiffs that was a sufficient basis for a contractual right to purchase stock under that arrangement.

CONCLUSION

If the Court were to review the merits of the Washington common law issues as Microsoft requests, there are many

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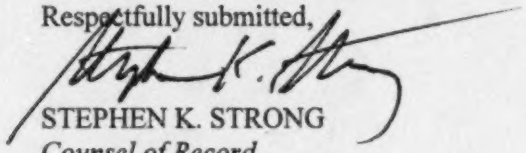
[2] www.seyfarth.com/insights/ MICROSOF.HTM (1/5/98)

arguments in *amici's* briefs that should be disregarded because they are based on false factual assertions concerning the nature of the employees in the class.

The proposed briefs should be rejected.

DATED: January 5, 1998.

Respectfully submitted,



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